STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Peter D. O'Connell, Stephen L. Borrello, and Elizabeth L. Gleicher

CHARLIE B. HOBSON and
MARY L. HOBSON, husband and wife,

Plaintiffs-Appellees,

v

INDIAN HARBOR INSURANCE COMPANY, a foreign corp., XL INSURANCE AMERICA, INC., a foreign corp., and XL INSURANCE COMPANY OF NEW YORK, INC., a foreign corp.,

Defendants-Appellants,
-and-

WILSON INVESTMENT SERVICE AND CONSTRUCTION, INC., WILSON INVESTMENT SERVICE, CRESCENT HOUSE APARTMENTS, CRESCENT HOUSE APARTMENTS, LLC, W-4 FAMILY LIMITED PARTNERSHIP, W-4 FAMILY, LLC and JAMES P. WILSON,

Defendants-Appellees.
_____/

Supreme Court No. _____

Court of Appeals No. 316714

Lower Court No. 12-008167-CK

DEFENDANTS-APPELLANTS XL INSURANCE, ET AL.S' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants Indian Harbor Ins. Co., XL Ins. America Inc., and XL Ins. Co. of New York (hereinafter collectively referred to as "XL Insurance") seek leave to appeal the March 10, 2015 Order of the Court of Appeals. (Ex. A.) In this Order, the Court of Appeals affirmed the June 6, 2013 Order of the Wayne County Circuit Court denying its Motion for Summary Disposition. (Id.) In this motion, XL Insurance sought dismissal of this declaratory judgment action on the grounds that an unambiguous policy exclusion precluded coverage.

MCR 7.302(B)(2)(a) & (C)(4) empower this Court to consider applications for leave to appeal from orders of the Court of Appeals, so long as such applications are filed within 42 days after the Court of Appeals' order. MCR 7.302(B), in relevant part, requires that an application for leave to appeal to this Court show that "the issue involves legal principles of major significance to the state's jurisprudence," or that "the decision is clearly erroneous and will cause material injustice…." MCR 7.302(B)(3) & (B)(5).

This Application satisfies MCR 7.302(B)(3) and (B)(5). In denying XL Insurance's motion, the lower courts appear to have invoked some form of the "doctrine of illusory coverage" (see 5/24/13 trans, pp 14-15), contrary to *Ile v Foremost Ins Co*, 493 Mich 915; 823 NW2d 426 (2012).[1] In *Ile* this Court held:

> The Court of Appeals erroneously concluded that the underinsured motorist coverage in the insurance policy issued by the defendant … was illusory because [plaintiff] could reasonably believe that his insurance premium payment included some charge for underinsurance when there are no circumstances in which [plaintiff] could recover underinsured motorist benefits given the

[1] In *Ile*, the Court of Appeals described the doctrine as follows: "[t]he 'doctrine of illusory coverage' encompasses a rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in such a way that an insured's coverage is never triggered and the insurer bears no risk." *Ile v Foremost Ins Co*, 293 Mich App 309, 315-316; 809 NW2d 617 (2011) (citations omitted).

> policy limits Ile selected. **We have expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract.** The lower court applied the same reasoning as the Court to Appeals panel in *Ile*. *Ile*, 493 Mich at 915 (emphasis added).

Here, the trial court commented at the May 24, 2013 hearing:

> Why would this person buy your insurance? Why? And then he has a fire and somebody is injured and you say oh, you're not covered. … If they would have just been burned, they would have been covered. … That's an absurd result in reading this policy. They couldn't have intended this when you have this total pollution exclusion…. (5/24/13 trans, pp 14-15.)

In affirming, the Court of Appeals conflated smoke with fire (Ex. A, p 6), and essentially reasoned that a pollution exclusion just could not apply to these facts, regardless of its language. The panel placed unwarranted emphasis on the historic "impetus behind pollution exclusion clauses similar to the one at issue" (Id., p 5) – rather than the policy language – and determined that XL Insurance's position would "extend the scope of the pollution exclusion beyond the scope of its original intent…." (Id., p 6.) Ultimately, the panel found that pollution exclusions only apply to "'occurrences' involving the pollutant as a pollutant" (Id., p 7) – in other words, judicially inserting a limitation into the exclusion, in direct contradiction to *McKusick v Travelers Indem Co*, 246 Mich App 329; 632 NW2d 525 (2001),[2] which the panel was bound by MCR 7.215(J)(1) to follow.

[2] "The scope of the total pollution exclusion has been repeatedly litigated, spawning conflicting judicial decisions throughout the country." *Apana v TIG Ins Co*, 574 F3d 679, 682 (9th Cir 2009). "Most state courts fall roughly into one of two broad camps." *Id.* "Some courts apply the exclusion literally because they find the terms to be clear and unambiguous." *Id.* "Other courts have limited the exclusion to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders' reasonable expectations." *Id.* Michigan falls within the first camp, i.e., states that "apply the exclusion literally." See *Id.*, citing *McKusick*. The Court of Appeals effectively accepted Plaintiff's invitation to follow the second camp, i.e., to give weight to the "policyholders' reasonable expectations."

This Court's holding in *Ile* makes clear that the perceived expectations of a party – which the trial court and, in a less obvious way, the Court of Appeals relied upon – *may not* override unambiguous policy language. Indeed, the error was even more apparent here, as the insured had no reasonable expectation of coverage for "smoke" or "soot" damages flowing from a fire, where a "hostile fire" exception to the pollution exclusion had been expressly and unambiguously *removed* from the policy by the Total Pollution Exclusion Endorsement. (See Ex. A, p 2 n 2.)

Following this Court's decision in *Ile*, a policy cannot be illusory when there are circumstances where the insured's coverage could be triggered. Here, in denying XL Insurance's motion, the trial court acknowledged at least one such circumstance – if the underlying tort claimants had been burned. (5/24/13 trans, pp 14-15.) The Court of Appeals majority echoed this. (Ex. A, pp 3, 5.) Nonetheless, both courts refused to apply the Total Pollution Exclusion, with the trial court finding that doing so would be "absurd." (Id.) For these reasons, this Court's review is necessary in order to ensure that the bench and bar have sufficient guidance on the meaning of *Ile* and the status of the "doctrine of illusory coverage" in this State's jurisprudence. The requirements of MCR 7.302(B)(3) & (B)(5) are also satisfied because the lower court's holding was contrary to other precedents of this Court, discussed below.

DATE AND NATURE OF THE ORDER APPEALED FROM

XL Insurance seeks leave to appeal the March 10, 2015 opinion of the Court of Appeals. The Order denied XL Insurance's Application for Leave to Appeal. In that opinion, the Court of Appeals affirmed the Wayne County Circuit Court's Order of June 6, 2013, which denied XL Insurance's Motion for Summary Disposition. The motion had been brought pursuant to MCR 2.116(C)(10).

INTRODUCTION AND SUMMARY

By refusing to apply XL Insurance's clear and unambiguous Total Pollution Exclusion, the lower courts disregarded decades of precedent from the Court of Appeals and this Court. "Clear and specific exclusions must be given effect." *Allstate Ins Co v Keillor*, 450 Mich 412, 417; 437 NW2d 589 (1995). "If the exclusion language is clear and unambiguous, [courts] will apply it as written." *South Macomb Disposal Auth v Am Ins Co*, 225 Mich App 635, 658; 572 NW2d 686 (1997).

Michigan courts "construe an insurance policy in the same manner as any other species of contract, giving its terms their ordinary and plain meaning if such would be apparent to a reader of the instrument." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties…." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract." *DeFrain*, 491 Mich at 372, quoting *Rory*, 473 Mich at 468-469. This is precisely what the lower courts did here – "rebalance[d] the contractual equities struck by the contracting parties" and "abrogate[d] unambiguous contractual provisions based on its own independent assessment of 'reasonableness.'" This Court's review is therefore warranted.

In this case, it is undisputed that the applicable policy contains an exclusion for "[b]odily injury" or "property damage" which "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." (Ex. B.) Elsewhere in the policy, the term "pollutants" is defined as

"any solid, liquid, gaseous or thermal irritant or contaminant, *including smoke* … [and] *soot*…." (Id., emphasis added.) Plaintiffs' alleged injuries, which include "smoke inhalation injuries" (Ex. C, ¶¶ 10, 11), fall squarely within the plain language of paragraph (f)(1) of the Total Pollution Exclusion – notwithstanding the trial court's subjective belief regarding the insured's expectations when it purchased the policy, consideration of which was improper under *Ile*, 493 Mich at 915.

When the Court of Appeals initially denied XL Insurance's interlocutory application without addressing the merits, this Court directed the Court of Appeals to consider XL Insurance's arguments "as on leave granted." *Hobson v Indian Harbor Ins Co*, 496 Mich 851; 846 NW2d 923 (2014). Now that the Court of Appeals has affirmed the trial court's determination that smoke and soot from a fire simply cannot be pollutants – even when the policy defines "pollutants" as such – this Court's review is once again warranted for reasons discussed above and explained in more detail below.

RELIEF SOUGHT

XL Insurance respectfully requests that its Application for Leave to Appeal be granted, and that it be allowed to pursue an appeal of the Court of Appeals' March 10, 2015 decision, which affirmed the Wayne County Circuit Court's June 6, 2013 Order denying XL Insurance's Motion for Summary Disposition.

In the alternative, XL Insurance respectfully requests that this Supreme Court peremptorily reverse the Court of Appeals, and remand the case for entry of an Order granting XL Insurance's Motion for Summary Disposition.

STATEMENT OF THE QUESTION PRESENTED

I. **In this insurance coverage dispute over the application of a "total pollution exclusion," were the lower courts' decisions contrary to this Court's precedent, where it allowed the expectations of the insured to trump insurance policy language?**

Plaintiffs-Appellees will presumably contend that the answer to the question should be **"No."**

Defendants-Appellees Wilson et al. will presumably contend that the answer to the question should be **"No."**

It is believed the trial court, Judge MacDonald, would answer the question **"No."**

The Court of Appeals answered the question **"No."**

Defendants-Appellants XL Insurance, et al. contend that the answer is **"Yes."**

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Plaintiffs were allegedly injured in a fire, which occurred in the apartment complex Plaintiffs were residing in, on July 17, 2008. (Ex. D, ¶ 8.) Plaintiffs were renting a unit in the apartment complex, which was allegedly owned by "WILSON INVESTMENT SERVICE AND CONSTRUCTION, INC., WILSON INVESTMENT SERVICE, CRESCENT HOUSE APARTMENTS, CRESCENT HOUSE APARTMENTS, LLC, W-4 FAMILY LIMITED PARTNERSHIP, W-4 FAMILY, LLC and JAMES P. WILSON," referred to collectively by Plaintiffs as "Defendants Wilson." (Id., ¶ 4.) At the time of the fire, Defendants Wilson had allegedly "contracted with the referenced Defendant insurance companies [XL Insurance] for policies of liability insurance…." (Id.)

XL Insurance declined to defend or indemnify Defendants Wilson on the basis of a Total Pollution Exclusion, which states:

TOTAL POLLUTION EXCLUSION ENDORSEMENT

> This endorsement modifies insurance provided under the following:
>
> **COMMERCIAL GENERAL LIABILITY COVERAGE PART**
>
> Exclusion **f.** under Paragraph **2., Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:
>
> This insurance does not apply to:
>
> **f. Pollution**
> **(1)** "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
> **(2)** Any loss, cost or expense arising out of any:
> **(a)** Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove,

> contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
> **(b)** Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants." (Ex. B, emphasis in original.)

Elsewhere in the policy, the term "pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, *including smoke* … [and] *soot*…." (Id., emphasis added.)

Plaintiffs filed a negligence action against Defendants Wilson, Wayne County Circuit Court No. 11-007287-NO ("the Underlying Case"). (Ex. C.) Plaintiffs' Complaint in the Underlying Case alleged that both Plaintiffs suffered "smoke inhalation injuries," among other injuries, in the July 17, 2008 fire. (Id., ¶¶ 10, 11.) Plaintiffs later filed a "Complaint for Declaratory Relief" against, among others, XL Insurance, alleging that XL Insurance is responsible for the defense and indemnity of Defendants Wilson in the Underlying Case.

XL Insurance moved for summary disposition, invoking its Total Pollution Exclusion. Initially, XL Insurance also challenged Plaintiffs' standing to bring the declaratory judgment suit – as the Plaintiffs are not XL Insurance's insured – but XL Insurance withdrew its standing argument after the Plaintiffs obtained a judgment against XL Insurance's insured (Wilson, et al.) in the Underlying Case. With the standing question out of the way, the lower court proceeded to consider the applicability of the Total Pollution Exclusion at a hearing on May 24, 2013. At this hearing, the lower court denied XL Insurance's motion, finding that the Total Pollution Exclusion simply could not be read so as to apply to a fire loss. Put another way, the lower court felt that excluding coverage for damages flowing from "smoke" and "soot," while otherwise covering fire losses, would be "absurd." (5/24/13 trans, pp 14-15.) The lower court further

opined that, under XL Insurance's interpretation of the policy, there would have been no benefit to buying to the policy at all. (Id.) The crux of the lower court's holding was as follows:

> Why would this person buy your insurance? Why? And then he has a fire and somebody is injured and you say oh, you're not covered. … If they would have just been burned, they would have been covered. … That's an absurd result in reading this policy. They couldn't have intended this when you have this total pollution exclusion endorsement which refers to pollution as something that has to be discharged, seeped, migrated, release[d] or escaped. None of which happened here; it was a fire. A fire has smoke. Your motion is denied. (Id.)

An order memorializing this holding was entered on June 6, 2013. XL Insurance promptly filed an Application for Leave to Appeal to the Court of Appeals. The Court of Appeals denied leave on December 20, 2013. (Ex. A, p 2 n 1.) XL Insurance then filed an Application for Leave to Appeal to this Court. "[I]n lieu of granting leave to appeal," this Court remanded the case "to the Court of Appeals for consideration as on leave granted." *Hobson,* 496 Mich at 851.

On remand, the Court of Appeals affirmed. (Ex. A.) The panel began its analysis with a discussion of the historic "impetus behind pollution exclusion clauses similar to the one at issue" (Id., p 5) – rather than the policy language – and determined that XL Insurance's position would "extend the scope of the pollution exclusion beyond the scope of its original intent and beyond the plain meaning of the language contained in the exclusion." (Id., p 6.) This was because, in the panel's view, the Plaintiffs had not alleged that their injuries were "caused in whole or in part by a pollutant that was discharged, dispersed, released, seeped, migrated or escaped" but rather, by "the negligence of the insured, which resulted in a fire." (Id., p 5.) The panel seemingly acknowledged that the Plaintiffs allegedly suffered smoke inhalation injuries (Id., pp 3, 6), that the Plaintiffs did not claim to have been burned (Id.), that the policy defined "pollutants" to

include smoke and soot (Id., p 5), and that the policy contained an exclusion for "bodily injury … which would not have occurred in whole *or in part* but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." (Id., p 4, emphasis added.) However, the panel looked past the nature of the injuries alleged by the Plaintiffs, and instead characterized their claim as being about "the negligence of the insured" in starting the fire. (Id.)

The panel went on to consider the meaning of the words "discharge," "disperse," "release," "escape," and "seepage," and concluded that none of these things happened here because the smoke came from "a fire started at the complex where they were located." (Id., p 6.) Although the panel seemingly recognized that pollution exclusions can contain "hostile fire" exceptions, and that this particular exclusion did not contain such an exception (Id. p 2 n 2), the panel still essentially found that the presence of a hostile fire prevented the pollution exclusion from applying in this case. (Id., p 6.) The majority concluded its analysis with a brief survey of other state's decisions, which led it to conclude that pollution exclusions only apply to "'occurrences' involving the pollutant as a pollutant." (Id., p 7.)

Judge O'Connell concurred with the majority's analysis in all respects, but wrote separately to identify an additional basis for affirming which none of the parties had briefed. Judge O'Connell's concurrence focused on Section I – Coverages, 2. Exclusions, on the fifth page of the policy, which provides that "[e]xclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with the permission of the owner." (Ex. A, concurring opinion, p 2.) Since the Total Pollution Exclusion is exclusion f., this language, according to Judge O'Connell, negated XL Insurance's ability to invoke that exclusion. However, this language only applies to "premises … rented to" *the insured* or

"temporarily occupied by" *the insured*, "with the permission of the owner." (See Id.) The insured – the Defendants Wilson – owned the apartment complex in question; there is nothing in the record suggesting that the complex was rented to the Defendants Wilson or occupied by the Defendants Wilson with the permission of some other entity. (See Ex. A, p 2, citing Plaintiffs' complaint averment "that the Wilson defendants owned and operated the apartment building….") Judge O'Connell apparently focused on the first half of the sentence – opining that "exclusion f. does not apply in this case because the Hobsons' claim concerns 'damage by fire to premises'" – without considering the second half of the sentence (i.e., "premises … *rented to you* or *temporarily occupied by you*….").

XL Insurance now brings this Application for Leave to Appeal to this Supreme Court.

STANDARD OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. As noted above, one of the criteria for granting Supreme Court applications is where a decision of a lower court is clearly erroneous and, if not reviewed and reversed, will result in material injustice. MCR 7.302(B)(5). That is the case here, as the decision below is inconsistent with well established Supreme Court precedent – particularly *DeFrain*, 491 Mich at 372[3] and *Ile*, 493 Mich at 915 – for reasons mentioned above and discussed in more detail below.

Another one of the criteria for granting Supreme Court applications is where "the issue involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3). XL Insurance submits that the proper application of Supreme Court precedent by the lower

[3] "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract." *DeFrain*, 491 Mich at 372, quoting *Rory*, 473 Mich at 468-469.

courts, as it relates to the important issue of interpreting insurance policies, is an issue of statewide significance.

The second standard of review relates to the actual decision of the court below that is the subject of the Application. The decision of the court below was to deny XL Insurance's Motion for Summary Disposition, which had been brought under MCR 2.116(C)(10). Decisions to grant or deny motions for summary disposition under (C)(10) are reviewed on appeal *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This appeal also involves questions about the construction of an insurance policy, which are also reviewed *de novo*. *DeFrain, supra* at 366-367. Where the standard of review is *de novo*, appellate courts should not consider themselves "bound to any degree by the opinions of the trial courts on questions of law." Martineau, *Fundamentals of Modern Appellate Advocacy* (Rochester, NY: Lawyers Cooperative Publishing, 1985), § 7.27, p 138. This is because "[o]ne of the purposes in having appellate courts, i.e., to ensure uniformity in the application of the law, would be lost if the appellate courts had to give substantial deference to the trial court's views.... The almost universal rule is ... that the appellate court is free to come to its own conclusions on questions of law." *Id.* See also *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 115-116; 490 NW2d 337 (1992), noting that "[t]he term '*de novo*' has been defined as 'anew; afresh; again; a second time; once more; in the same manner, or with the same effect.' … The very concept of '*de novo*' means that all matters therein are to be considered 'anew; afresh; over again…'"

"*De novo* review is sometimes referred to as 'plenary review,' no doubt because it allows the court to give a full, or plenary, review to the findings below." Beazley, *A Practical Guide to Appellate Advocacy*, (New York: Aspen Law & Business, 2002), § 2.3.1(b), p 15. Courts

applying this standard "look at the legal questions as if no one had as yet decided them, giving no deference to any findings made below." *Id.* "When this standard is applied, the reviewing court is permitted "to substitute its judgment for that of the trial court…." *Id.*

On *de novo* review, this Court should reverse, and grant summary disposition in favor of XL Insurance, as the unambiguous language of the Total Pollution Exclusion foreclosed coverage for the Hobsons' underlying tort claim. Moreover, in denying XL Insurance's motion, the lower courts appear to have applied the doctrine of "illusory coverage" in a manner that has expressly been rejected by this Court, see *Ile,* 493 Mich at 915, or have otherwise rewritten the XL Insurance policy so as to put the "hostile fire" exception to the Total Pollution Exclusion *back into* the policy, contrary to a specific endorsement. (See Ex. A, p 2 n 2.)

ARGUMENT

I. The lower courts acted contrary to this Court's precedent, and allowed the expectations of the insured to trump insurance policy language, when they denied XL Insurance's Motion for Summary Disposition. The underlying claim, for which coverage was sought, involved smoke inhalation injuries, the XL policy contained a total pollution exclusion, and the XL policy specifically defined a "pollutant" to include "smoke" and "soot." As stated in multiple decisions of this Court, the lower court was bound to apply this unambiguous language as written.

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory*, 473 Mich at 461. See also *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 206; 747 NW2d 811 (2008): "When interpreting insurance contracts, standard contract laws apply." "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory*, 473 Mich at 461. "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties…." *Id.* "[T]he construction and interpretation of an insurance contract is a question of law for a court to determine…." *Henderson v State Farm Fire & Cas Co,* 460 Mich 348, 353; 596 NW2d 190 (1999).

"It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party…." *Id.* "[I]n reviewing an insurance policy dispute [courts] must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction. *Id.* (citation omitted). "First, an insurance contract must be enforced in accordance with its terms." *Id.* (citation omitted). "A court must not hold an insurance company liable for a risk that it did not assume." *Id.* "Second, a court should not create ambiguity in an insurance policy where the

terms of the contract are clear and precise." *Id.* "Thus, the terms of a contract must be enforced as written where there is no ambiguity." *Id.* It is "[a] fundamental tenet of our jurisprudence" that "unambiguous contracts are not open to judicial construction and must be *enforced as written.*" *Rory, supra* at 468 (emphasis in original).

"[A]n insurance contract should be read as a whole and meaning should be given to all terms. … An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 715; 706 NW2d 426 (2005).

"[I]t is the insured's burden to establish that his claim falls within the terms of the policy," and "it is impossible to hold an insurance company liable for a risk it did not assume." *Hunt v Drielick,* 496 Mich 366, 372-373; 852 NW2d 562 (2014). Therefore, "clear and specific exclusions must be enforced…." *Id.* Moreover, "[c]overage under a policy is lost if any exclusion in the policy applies to an insured's particular claims." *Hayley v Allstate Ins Co,* 262 Mich App 571, 574; 686 NW2d 273 (2004), quoting *Century Surety Co v Charron,* 230 Mich App 79, 83; 583 NW2d 486 (1998). In *Vanguard Ins Co v Clarke,* 438 Mich 463, 470; 475 NW2d 48 (1991),[4] this Court rejected the concept of "dual causation," in the context of coverage issues. In other words, if an injury flows in part from a covered occurrence, and in part from an excluded occurrence, the policy exclusion will control.

Here, it is undisputed that the applicable policy contains an exclusion for "[b]odily injury" or "property damage" which "would not have occurred in whole or part but for the

[4] Overruled on other grounds by *Wilkie v Auto-Owners Insurance Co,* 469 Mich 41, 58-59; 664 NW2d 776 (2003).

actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." Elsewhere in the policy, the term "pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, *including smoke* … [and] *soot*…." (Ex. B, emphasis added.) The underlying Plaintiffs alleged "smoke inhalation injuries." (Ex. C attached to Defendants' Motion, ¶¶ 10, 11.)

Vanguard's discussion of dual causation is relevant here because, as Plaintiffs argued below, Plaintiffs' alleged injuries may have been covered if they had been only burned by the fire and therefore, it would be illogical to apply the exclusion, where the alleged injuries resulted from smoke caused by a fire. The lower courts apparently accepted this reasoning (i.e., that there is coverage because a covered loss – fire – set in motion a chain of events that led to the otherwise excluded "smoke" and "soot"). (See Ex. A, p 6.) However, this reasoning is irreconcilable with *Vanguard*. As explained in *Iroquois on the Beach, Inc v General Star Indem Co*, 550 F3d 585, 588 (6th Cir 2008) – which applied Michigan law in diversity:

> …many jurisdictions have adopted the doctrine of "efficient proximate cause," or what Michigan courts call the theory of "dual or concurrent causation." This theory applies when "two or more identifiable causes, at least one of which is covered under the policy and at least one of which is excluded thereunder, contribute to a single loss." … Under this doctrine, "if the cause which is determined to have set the chain of events in motion, the efficient proximate cause, is covered under the terms of the policy, the loss will likewise be covered." … Jurisdictions that have adopted this doctrine generally allow parties to contract out of its application by adopting an anti-concurrent, anti-sequential clause….
>
> Here, [plaintiff] essentially argues that we should apply the efficient-proximate-cause doctrine because there are two causes, one of which is excluded (seepage of water) and one of which is covered (windstorms), and the covered cause (windstorms) set in motion the chain of events leading to the loss. **However, the Supreme Court of Michigan has expressly declined to adopt this doctrine,** explaining that it found no reason "to introduce a legal theory or doctrine that departs from the literal interpretation

> of an unambiguous insurance contract." See *Vanguard Ins. Co. v. Clarke*, 438 Mich. 463, 475 N.W.2d 48, 53 (Mich. 1991)…. **Thus, the default rule under Michigan law is that a loss is not covered when it is concurrently caused by the combination of a covered cause and an excluded cause. (Emphasis added, citations omitted.)**

Plaintiffs also argued below that the term "pollutants" – expressly defined in the policy to include "smoke" and "soot" – could not possibly include smoke "from a fire." (Ex. E, p 5.) This, of course, forces us to ask: where else could smoke or soot come from? Plaintiffs argued – and the Court of Appeals agreed (Ex. A, pp 6-7) – that the exclusion could only apply if the smoke or soot had at some point been contained, and was later "discharged," "seeped," or was otherwise "released or escaped." However, this argument seemed to arise from an unstated assumption that a "hostile fire" exception to the Total Pollution Exclusion was in the policy See, e.g., *Noble Energy, Inc v Bituminous Cas Co,* 529 F3d 642, 648 (5th Cir 2008). Such an exception to the exclusion, although initially included in the policy (see Ex. F),[5] was *expressly eliminated* by the Total Pollution Exclusion Endorsement, which states: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." (Id., emphasis in the endorsement.) It goes on to state: "This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART *Exclusion f.* under Paragraph 2., Exclusions … is replaced by the following…." (Id., emphasis in the endorsement.) "The following" does not include the "hostile fire" exception to the exclusion, which Plaintiffs tacitly relied upon below.

[5] The policy used to say: "this subparagraph does not apply to … (iii) 'bodily injury' or 'property damage' arising out of heat, smoke or fumes from a 'hostile fire'…." (Ex. F.) The Total Pollution Exclusion Endorsement specifically removed this language. (Id.)

The lower courts erroneously construed the policy as if there was a "hostile fire" exception to the pollution exclusion,[6] apparently based on Plaintiffs' assertion that such an exception would have been logical or reasonable. (See Ex. E, pp 10-11.) However, "[i]nsurance contract law … dictates that when an endorsement deletes language from a policy, a court must not consider the deleted language in its interpretation of the remaining agreement." *Valassis Communications v Aetna Cas & Sur Co,* 97 F3d 870, 873 (6th Cir 1996) (applying Michigan law in diversity). "When an endorsement conflicts with an insurance contract, the endorsement controls. … The endorsement must be regarded as a modification of the terms of the original contract of insurance…." *Whitt Mach, Inc v Essex Ins Co,* 631 F Supp 2d 927, 934-935 (SD Ohio 2009). See also *Besic v Citizens Ins Co of the Midwest,* 290 Mich App 19, 26; 800 NW2d 93 (2010): "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails."

Plaintiffs also asserted that the exclusion should not apply because "the policy defines the occurrence as an accident which is exactly what happened….." (Ex. E, p 11.) However, "[t]he very nature of an exclusion is that it creates an exception to coverage that might otherwise be available under other terms of the policy." *Brocious v Progressive Ins Co,* 1999 Ohio App LEXIS 3720 (Ohio Ct App, Aug 12, 1999) (Ex. F-3). Otherwise, policy exclusions would be unnecessary. "[E]xclusionary clauses limit the scope of coverage provided under the insurance contract…." *Hawkeye-Security Insurance Co. v Vector Construction Co,* 185 Mich App 369,

[6] The Court of Appeals initially acknowledged that the "hostile fire" exception had "no bearing in this case" (Ex. A, p 2 n 2), but then basically found that the exclusion could not apply because there was a hostile fire (Id., p 6).

384; 460 NW2d 329 (1990). Thus, the fact that the loss would have fallen within the coverage terms, absent an exclusion, is completely irrelevant.

Indeed, in denying XL Insurance's motion, the lower courts appear to have invoked some form of the doctrine of illusory coverage. This doctrine was described by the Court of Appeals in *Ile*, 293 Mich App at 315-316 as follows: "[t]he 'doctrine of illusory coverage' encompasses '[a] rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in such a way that an insured's coverage is never triggered and the insurer bears no risk.'" **However, this Court later reversed**, noting:

> The Court of Appeals erroneously concluded that the underinsured motorist coverage in the insurance policy issued by the defendant … was illusory because [plaintiff] could reasonably believe that his insurance premium payment included some charge for underinsurance when there are no circumstances in which [plaintiff] could recover underinsured motorist benefits given the policy limits Ile selected. We have expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract. *Ile*, 493 Mich at 915.

The lower courts here applied the same reasoning as the Court of Appeals panel in *Ile.* (See, e.g., Ex. A, p 3.) This Court's holding in *Ile* makes clear that the perceived expectations of a party *may not* override unambiguous policy language. Indeed, the error was even more apparent here, as the insured had no reasonable expectation of coverage for "smoke" or "soot" damages flowing from a fire, where the "hostile fire" exception to the prior pollution exclusion had been expressly and unambiguously removed from the policy by the Total Pollution Exclusion Endorsement. (See Ex. F.)

The Court of Appeals also found that smoke from a fire could not trigger the exclusion based upon the definitions of "discharge," "disperse," "release," "escape," and "seepage." (Ex. A, p 6.) The panel's analysis in this respect contravenes the commonly understood

meanings of these words. As noted above, the Total Pollution Exclusion Endorsement excludes any "bodily injury" which "would not have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape" of "pollutants" (which, again, the policy defines to include "smoke" and "soot"). (Id., p 2.) The exclusion uses the word "or," meaning the list is disjunctive and any one of the six events listed (a discharge, dispersal, seepage, migration, release, *or* escape) will trigger the exclusion. See *Holiday Hospitality Franchising, Inc v AMCO Ins Co*, 983 NE2d 574, 579 (Ind 2013). Plaintiff relied on one of the several definitions of "disperse" provided by Merriam-Webster (Ex. G, p 13), but one of the definitions Plaintiffs ignored is significant: "to cause to become spread widely." (Ex. G-12, definition of "disperse," p 1 of 5.) There is little doubt that fire causes smoke "to become spread widely." Likewise, one of the definitions of "migrate" is "to change position in … [a] substance." (Ex. G-12, definition of "migrate," p 1 of 3.) This is precisely what fire does: causes smoke to migrate through the air. Also, Plaintiffs selectively quoted Merriam-Webster's definition of "release," ignoring that one of Merriam-Webster's examples is "the release of heat into the atmosphere." (Ex. G-12, definition of "release," p 3 of 5.) Again, fire releases both smoke and heat into the atmosphere. Indeed, if a fire could not by its very nature cause a "discharge, dispersal, seepage, migration, release, or escape" as Plaintiffs asserted (Ex. G, p 13), then the rescinded "hostile fire" exception that originally appeared in the policy would have been completely useless because, under Plaintiffs' reasoning, a hostile fire could never implicate the pollution exclusion in the first place. In short, if the pollution exclusion required that the

pollutant first be contained – and then somehow break free of its containment – before the exclusion could apply, then the policy easily could have said so. It does not.[7]

XL Insurance is also compelled to address the additional "reason to rule in plaintiff's favor" identified by the concurring Court of Appeals Judge. The concurring opinion by Judge O'Connell cites an alternative basis for affirming that the Plaintiffs never raised: Section I—Coverages, 2. Exclusions, on the fifth page of the policy, provides that "[e]xclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with the permission of the owner." (Ex. A, concurring opinion, p 2.) Since the Total Pollution Exclusion is exclusion f., this language supposedly (in the eyes of Judge O'Connell) negated XL Insurance's ability to invoke that exclusion. Simply put, this language is inapplicable to this case because it only applies to "premises … rented to" *the insured* or "temporarily occupied by" *the insured*, "with the permission of the owner." The word "you" as used in this section refers to the named insured, Defendants Wilson, not to third-party tort claimants such as these Plaintiffs.

[7] To a large extent, Plaintiffs' argument – that a pollutant first had to be "contained" in order for the exclusion to apply – seemed to flow, again, from the tacit assumption that the pollution exclusion should only apply to traditional environmental incidents. Although not squarely addressed in Michigan case law, numerous courts throughout the United States have held that pollution exclusions *are not* limited to "traditional environmental damage." As the Eighth Circuit recently noted, "although the pollution exclusion was 'quite broad,' it was unambiguous and was not limited to traditional environmental damage." *Church Mut Ins Co v Clay Center Christian Church,* 746 F3d 375, 380 (8th Cir 2014) (citation omitted). The panel further observed that a "majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants." *Id.* (citation omitted). Additionally, in a statement that could have been in direct response to Judge MacDonald's comments here, the panel noted that "[t]he broad nature of the pollution exclusion may cause a commercial client to question the value of portions of its commercial general liability policy, but, as an appellate court reviewing terms of an insurance contract, we cannot say that the language of the pollution exclusion is ambiguous in any way." *Id.* Such an approach is consistent with, if not mandated by, our Supreme Court's holding in *Rory*, 473 Mich at 470 that an unambiguous insurance policy provision "is to be enforced as written" irrespective of any "judicial assessment of 'reasonableness'…."

Defendants Wilson owned the apartment complex in question; there is nothing in the record suggesting that the complex was rented to the Defendants Wilson or occupied by the Defendants Wilson with the permission of some other entity. (See Ex. A, p 2, citing Plaintiffs' complaint averment "that the Wilson defendants owned and operated the apartment building….") Judge O'Connell oversimplified this provision by opining that "exclusion f. does not apply in this case because the Hobsons' claim concerns 'damage by fire to premises,'" without giving consideration to the rest of the clause (i.e., "premises … *rented to you* or *temporarily occupied by you*…."). The fact that the insured owned the premises negates this exception to the pollution exclusion (which may explain why Plaintiffs, represented by competent counsel throughout, never raised this argument).[8]

XL Insurance must also address certain arguments that were raised by the Plaintiffs in the Court of Appeals, but were not expressly relied upon by the panel. In their Court of Appeals Brief, Plaintiffs asserted that the Total Pollution Exclusion Endorsement did not apply because their injuries were "due to the fire and smoke," and not merely smoke alone. (Ex. G, Appellees' Brief, pp 4, 7, 9.) Plaintiffs seemed to be implying that they were burned in the fire. (See Id.) But the record below is devoid of any such allegation.[9] Their Complaint in *Hobson v Wilson* said nothing about burns; the only specific injuries alleged were "smoke inhalation injuries" and related respiratory problems. The declaratory judgment Complaint action filed by the Hobsons said even less, merely referring back to the *Hobson v Wilson* Complaint. Again, there was no

[8] Judge O'Connell's concurrence also makes the same error as the majority: conflating smoke with fire. (Ex. A, concurring opinion, p 1.) Again, the Hobsons' injuries were not caused by fire, but by smoke.

[9] Indeed, had Plaintiffs claimed below that they had been burned, it would have made no sense for Judge MacDonald – at a critical point in her holding – to say "<u>if</u> they would have just been burned…." (5/24/13 trans, pp 14-15, emphasis added.)

mention, in the declaratory judgment Complaint, of either of the Hobsons being burned. Likewise, the Hobsons' brief in opposition to XL Insurance's Motion for Summary Disposition did not mention any burn injuries.

At the hearing of May 24, 2013, the comments of the Hobsons' counsel clarified that there *were no allegations of burn injuries.* (5/24/13 trans, p 11.) There, the Hobsons' counsel argued that under XL's interpretation, "if my clients … were burned … in the fire, well then there would be coverage," but because "they just … have … [damage to] their lungs … because of all the bi-products of a fire, then they're not covered." (Id., emphasis added.) While the Hobsons' counsel concluded that this position was, in his view, "absurd," it is telling that he never factually argued – in opposition to XL's MCR 2.116(C)(10) motion – that the Hobsons suffered something other than smoke inhalation injuries. Any such argument had to be made at that time.[10] Therefore, this argument – which seems to be central to the Plaintiffs' position in the Court of Appeals (Ex. G, pp 4, 7, 9) – has not been preserved.[11]

Moreover, even if the Plaintiffs had been burned (which they never asserted below), this would not matter under the plain language of the endorsement, which provides that "[t]his insurance does not apply to … bodily injury … which would not have occurred *in whole or in part* but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." (Ex. A, p 2, emphasis added.) The endorsement further

[10] Per *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), Plaintiffs were required to offer "substantively admissible evidence" *at the time of the (C)(10) motion hearing*. Also, *Quinto v Cross & Peters Co*, 451 Mich 358, 367 n 5; 547 NW2d 314 (1996) states that (C)(10) "plainly requires the adverse party to set forth specific facts *at the time of the motion*," and that the "court considers the evidence *then available to it*." (Emphasis added.) Indeed, the (C)(10) hearing has been described as "the 'put up or shut up' stage of the proceeding…." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

[11] See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007), noting that "[i]ssues raised for the first time on appeal are not ordinarily subject to review."

defines "pollutants" as any "gaseous or thermal irritant," including "smoke" or "soot." (Id.) Plaintiffs' position renders "in whole or in part" language nugatory, essentially writing it out of the endorsement altogether. Again, "[a]n insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group,* 267 Mich App at 715.

For the first time in the Court of Appeals,[12] Plaintiffs argued that that policy was ambiguous because the Total Pollution Exclusion Endorsement supposedly conflicts with the pollution exclusion that appears "in the body of the policy" (which contains the "hostile fire" exception). (Ex. G, pp 5-6, 10-12.) While the argument has some surface appeal – it does appear, at first blush, that there are two pollution exclusions – it ultimately fails because the exclusion "in the body of the policy" *was completely superseded, nullified, and erased* by the Total Pollution Exclusion Endorsement and therefore, there is no conflict and no ambiguity. See *Besic,* 290 Mich App at 26. As noted above, "[i]nsurance contract law … dictates that when an endorsement deletes language from a policy, a court must not consider the deleted language in its interpretation of the remaining agreement." *Valassis,* 97 F3d at 873. And again, as this Court has observed, "[e]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails." *Besic,* 290 Mich App at 26. Therefore, under well-established principles of insurance policy interpretation, the pollution exclusion "in the body of

[12] Plaintiffs never argued in the trial court that the policy was ambiguous, nor did they expressly invoke the superseded "hostile file" language from the "body of the policy." As noted above, "[i]ssues raised for the first time on appeal are not ordinarily subject to review." See *Coates,* 276 Mich App at 510.

the policy" *simply was not part of the analysis*, given the elimination of the "hostile file" language in the endorsement. The old pollution exclusion cannot conflict with anything because it ceased to be a part of the policy once the endorsement was issued.

In the Court of Appeals, Plaintiffs also devoted an inordinate amount of attention to XL Insurance's alleged breach of the duty to defend. But Plaintiffs acknowledge that the duty to defend is *broader* than the duty to indemnify. (Ex. G, p 8.) The Hobsons never sought a defense in the liability case (they were suing XL's Insured); it is the more narrow duty *to indemnify* that is at issue in this appeal. So it is unclear how any of this advanced the Plaintiffs' position. Even if XL Insurance breached the broader duty to defend, it would not necessarily entitle the Hobsons to anything, since the duty to defend would have been owed to XL's insured (Wilson, et al.), *not* these Plaintiffs. Moreover, Plaintiffs' entire discussion of the duty to defend "begs the question" by assuming the very thing that they sought to prove, i.e. that this was a covered loss.[13]

It is unclear to what extent these arguments distracted the Court of Appeals from the real issue, which this Court likely had in mind when it remanded this matter for consideration "as on leave granted": when Judge MacDonald disregarded the Total Pollution Exclusion Endorsement and denied XL Insurance's motion, she relied upon some form of the doctrine of illusory

[13] The duty to defend arises only if the complaint's allegations arguably fall within the policy's coverage." *Keely v Fire Ins Exchange*, 833 F Supp 2d 722, 728 (ED Mich 2011) (applying Michigan law in diversity). "[T]he duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy. *If the policy does not apply, there is no duty to defend.*" *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996) (emphasis added). Moreover, the duty to defend can be "excused" by a "specific policy exclusion." *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 97 (2007) (Kelly, J., dissenting). See also *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 386; 565 NW2d 839 (1997). Therefore, Plaintiffs' argument regarding the duty to defend committed the "fallacy of begging the question," which "consists in taking for granted precisely what is in dispute, in passing off as an argument what is really no more than an assertion of your position." *Wilburn v Commonwealth*, 312 SW3d 321, 334 (Ky 2010) (Noble, J., dissenting).

coverage. This is problematic because in *Ile,* 493 Mich at 915 this Court again "expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract."

The lower court here applied the same reasoning as the Court of Appeals panel that was reversed in *Ile.* This Court's holding in *Ile* – which the Court of Appeals wholly ignored[14] – makes clear that the perceived expectations of a party *may not* override unambiguous policy language. Indeed, the error was even more apparent here, as the insured had no reasonable expectation of coverage for "smoke" or "soot" damages flowing from a fire, where the "hostile fire" exception to the prior pollution exclusion had been expressly and unambiguously removed from the policy by the Total Pollution Exclusion Endorsement. (See Ex. A, p 2 n 2.)

CONCLUSION AND REQUEST FOR RELIEF

The lower courts' denial of XL Insurance's Motion for Summary Disposition was in direct conflict with multiple precedents of this Court. The trial court refused to apply the Total Pollution Exclusion based upon its subjective view of the insured's expectations at the time the policy was issued, contrary to *Ile,* 493 Mich at 915. The Court of Appeals tacitly affirmed that holding. In so doing, the lower courts' holdings subject XL Insurance to risks that were not envisioned by the parties at the time the insurance contract was formed. "It is impossible to hold an insurance company liable for a risk it did not assume." *Allstate v Keillor,* 450 Mich at 417. "[A]n insurance company should not be required to pay for a loss for which it has charged no

[14] The Plaintiffs likewise ignored *Ile*. The closest Plaintiffs' Court of Appeals brief came to addressing this issue was to point out that the trial court may be affirmed if it reached the right result for the wrong reasons. (Ex. G, p 7 n 5.) However, it was Plaintiffs' counsel who – though his lengthy description of what pollution exclusions are "supposed" to mean (5/24/13 trans, pp 6-12) – urged the trial court to adopt a "reasonable expectations" type of analysis. Indeed, Plaintiffs' position in the trial court did not seem to rest upon much else.

premium." *Kirschner v Process Design Assocs, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999). "Perhaps the most fundamental rule of Michigan insurance jurisprudence is that an insurer can never be held liable for a risk it did not assume and for which it did not charge or receive any premium." *Dunn v Detroit Auto Inter-Insurance Exch*, 254 Mich App 256, 270; 657 NW2d 153 (2002). Here, XL Insurance charged no premium for losses resulting from "smoke" and "soot," such as the "smoke inhalation" injuries alleged by the Plaintiffs in the Underlying Case.[15]

Moreover, by conflating smoke with fire, the Court of Appeals contravened the long-standing principle that "contractual language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing whims of members of [the court]." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005). By treating smoke as the same thing as fire, the panel effectively wrote the "hostile fire" exception *back into* the Total Pollution Exclusion, even though that exception to the exclusion had been "clearly" removed by an endorsement "before the alleged injuries occurred." (Ex. A, p 2 n 2.)

For these reasons, XL Insurance respectfully requests that this Honorable Supreme Court enter an Order:

(A) Granting this Application for Leave to Appeal and permitting it to appeal the March 10, 2015 decision of the Court of Appeals or, in the alternative,

(B) Summarily reversing, vacating and holding for naught the March 10, 2015 decision of the Court of Appeals and June 6, 2013 Order of the Wayne County Circuit Court, and

[15] Indeed, the nature of the risk assumed by the insurer is central to the very definition of "coverage." See *United States Fid Ins & Guar Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 16; 795 NW2d 101 (2009), where this Court noted that "coverage" is defined in dictionaries as the "protection against a risk or risks specified in an insurance policy," "the risks within the scope of an insurance policy," and as the "amount, and extent of risk covered by insurer."

remanding the above-entitled cause of action to the Circuit Court for entry of a new Order granting XL Insurance's Motion for Summary Disposition.

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Dated: April 20, 2015

INDEX TO THE APPENDIX

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Peter D. O'Connell, Stephen L. Borrello, and Elizabeth L. Gleicher

CHARLIE B. HOBSON and
MARY L. HOBSON, husband and wife,

Plaintiffs-Appellees,

v

INDIAN HARBOR INSURANCE COMPANY, a foreign corp., XL INSURANCE AMERICA, INC., a foreign corp., and XL INSURANCE COMPANY OF NEW YORK, INC., a foreign corp.,

Defendants-Appellants,
-and-

WILSON INVESTMENT SERVICE AND CONSTRUCTION, INC., WILSON INVESTMENT SERVICE, CRESCENT HOUSE APARTMENTS, CRESCENT HOUSE APARTMENTS, LLC, W-4 FAMILY LIMITED PARTNERSHIP, W-4 FAMILY, LLC and JAMES P. WILSON,

Defendants-Appellees.
_____/

Supreme Court No. _____

Court of Appeals No. 316714

Lower Court No. 12-008167-CK

DEFENDANTS-APPELLANTS XL INSURANCE, ET AL.S' NOTICE OF HEARING RE APPLICATION FOR LEAVE TO APPEAL

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NOTICE OF HEARING

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that the attached **Application for Leave to Appeal** will be brought on for hearing before this Honorable Court on Tuesday, the 19th day of May, 2015. There will be no oral argument on the Application unless so ordered by the Court.

SECREST WARDLE

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Dated: April 20, 2015

3066784_1

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Peter D. O'Connell, Stephen L. Borrello, and Elizabeth L. Gleicher

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MARY L. HOBSON, husband and wife,

Plaintiffs-Appellees,

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_____/

Supreme Court No. _____

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Lower Court No. 12-008167-CK

DEFENDANTS-APPELLANTS XL INSURANCE, ET AL.S' NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

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NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

To: Clerk of the Court
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Clerk of the Court
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W-4 Family Limited Partnership, LLC and James Wilson

Please take notice that Defendants-Appellants XL Insurance, et al., has this day filed an Application for Leave to Appeal the March 10, 2015 Order of the Michigan Court of Appeals in the above-entitled cause of action with the Michigan Supreme Court.

SECREST WARDLE

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Dated: April 20, 2015

3066793_1

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Peter D. O'Connell, Stephen L. Borrello, and Elizabeth L. Gleicher

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Defendants-Appellees.

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Supreme Court No. _____

Court of Appeals No. 316714

Lower Court No. 12-008167-CK

DEFENDANTS-APPELLANTS XL INSURANCE, ET AL.S' PROOF OF SERVICE RE NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

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Attorney for Defendants-Appellees Wilson Investment, Crescent House Apartments Crescent House Apartments, LLC, W-4 Family Limited Partnership, W-4 Family, LLC and James Wilson
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(248) 541-5575
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/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

SANDRA L. VERTEL, first being duly sworn, deposes and states that on the 20th day of April, 2015, she served a true copy of ***Defendants-Appellants XL Insurance, et al's Notice of Filing Application for Leave to Appeal,*** upon:

Clerk of the Court
Michigan Court of Appeals

and

Clerk of the Court
Wayne County Circuit Court

Same were e-filed via the Courts' respective E-file and Serve systems.

SANDRA L. VERTEL, first being duly sworn, deposes and states that on the 20th day of April, 2015, she served a true copy of ***Defendants-Appellants XL Insurance, et al's Notice of Filing Application for Leave to Appeal,*** upon:

Mr. Mark R. Bendure
bendurelaw@cs.com

Mr. Bendure was served via e-service using the Tru-efiling system.

SANDRA L. VERTEL, first being duly sworn, deposes and states that on the 20th day of April, 2015, she served a true copy of ***Defendants-Appellants XL Insurance, et al's Notice of Filing Application for Leave to Appeal,*** upon:

Mr. Edmund O. Battersby
Mr. Samuel I. Bernstein
Attorneys at Law
31731 Northwestern Highway, #333
Farmington Hills, MI 48334

and

Mr. Francis W. Higgins
Attorney at Law
2799 Coolidge Highway
Berkley, MI 48072

Same were deposited in the United States mail with postage fully prepaid thereon.

Sandra L. Vertel

SANDRA L. VERTEL

Subscribed and sworn to before me this
20th day of April, 2015.

Samara Quinn

Notary Public
Oakland County, Michigan
Acting in _____ County
My Commission Expires: 12/28/2018

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